SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1147

FRANK G. RATH, INDIVIDUALLY AND AS PRESIDENT OF HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, COOKS' LOCAL UNION NO. 167, ET AL.,

Petitioners,

vs.

PEARL E. CROSBY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY,
HENRY KAISER,
JAMES A. GLENN,
MARTIN E. BLUM,
Counsel for Petitioners.

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Petitioners,

vs.

PEARL E. CROSBY.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Justices of The Supreme Court of the United States:

Frank G. Rath, individually and as President of the Hotel & Restaurant Employees' International Alliance, Cooks' Local Union No. 167, et al., respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Ohio, 139 Ohio State 151, rendered December 24, 1941, dismissing an appeal filed as of right from the decree of the Court of Appeals of Cuyahoga County, Ohio, and overruling motion for an order directing said Court of Appeals to certify its record.

A.

Summary Statement of Matter Involved

Frank G. Rath and the other petitioners are members and officers of the Joint Executive Board of the Hotel and Restaurant Employees' International Alliance, affiliated with the American Federation of Labor. This association is composed of members of Waiters' Union, Local No. 106, Waitresses' Union, Local No. 107, and Cooks' Union, Local No. 167, all of Cleveland, Ohio.

Pearl E. Crosby is the owner and operator of a restaurant in the City of Cleveland, Ohio (R. 28).

In August, 1937, two representatives of the petitioners called upon Mrs. Pearl E. Crosby in an effort to discuss with her the employment of members of the petitioners' labor union in her place of business. This she refused to do.

On October 4, 1937, the petitioners proceeded to patrol in front of employer's restaurant, carrying banners containing the following language:

> "Crosby's Restaurant unfair to organized labor. Please do not patronize. Cooks' and Waitresses' Union, affiliated with A. F. of L."

On October 11, 1937, a temporary consent decree was entered into, permitting two pickets in front and one in the rear of plaintiff's place of business.

On January 27, 1938, the Court of Common Pleas of Cuyahoga County heard the case on its merits and issued an injunction prohibiting picketing (R. 28). The case was heard *de novo* by the Ohio Court of Appeals, and the decree was reversed so as to permit peaceful picketing (R. 8). The Supreme Court of Ohio sustained a motion to certify filed by the appellee, Crosby, herein and by a majority opinion (136 Ohio St. 352) reversed the Court of Appeals

and sustained the Trial Court's decree, prohibiting picketing in any manner whatsoever.

Thereupon, your petitioners filed their petition for a writ of certiorari in the Supreme Court of the United States at the October Term, 1940, No. 187, which was denied February 10, 1941 (312 U. S. 690).

Thereafter, on July 21, 1941, three and one-half years after the events giving rise to said permanent injunction, your petitioners filed their motion in the Court of Appeals of Cuyahoga County, Ohio, to modify said injunction so as to permit peaceful picketing (R. 28), which motion was on September 15, 1941, overruled (R. 12). From the overruling of this motion your petitioners filed in the Supreme Court of Ohio their appeal as of right and motion for an order directing the Court of Appeals to certify its record (R. 3-4).

On December 24, 1941, the Supreme Court of Ohio overruled the motion for an order directing the Court of Appeals to certify its record and sustained the motion by appellee to dismiss the appeal filed as of right on the ground that no debatable constitutional question was involved in said case (R. 2).

B.

Statement as to Jurisdiction

Jurisdiction is invoked under Title 28, U. S. C. A. Section 344(b) (Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925).

The judgment of the Supreme Court of Ohio was rendered December 24, 1941. Application for rehearing, timely filed, was denied January 14, 1942 (R. 2).

The activities which premised the permanent injunction occurred in 1937. The Court of Common Pleas issued its injunction, restraining all picketing, on January 27, 1938. On May 25, 1939, the Court of Appeals modified the injunction so as to permit peaceful picketing. Under this modifi-

cation, petitioners peacefully picketed for a period of one day, when a temporary injunction restraining all picketing was issued pending appeal in the Supreme Court of Ohio (R. 31). Thus, except for a period of one day, there had been no picketing whatever of respondent's restaurant for a period of about three and one-half years, when, on July 21, 1941, your petitioners filed their motion to modify.

The injunction we sought to modify denies petitioners rights under the Fourteenth Amendment to the Federal Constitution. It enjoined

> "* * * picketing, bannering, or patrolling the streets or sidewalks adjacent to or in the vicinity of the plaintiff's place of business;"

your petitioners are further permanently enjoined

> "From inducing, or attempting to induce, any customer, prospective customer, or any person, firm or corporation with whom plaintiff deals, not to deal with plaintiff; and from making, publishing, distributing, or displaying any statement, oral, written, printed, painted, or otherwise, or from doing any other act or thing, with the intent, purpose or effect of injuring the plaintiff's business, and from threatening to do so." (R. 10).

The restraint of the above quoted paragraph is not limited to the vicinity of the respondent's place of business but is universal. That the injunction has been fully complied with is undisputed.

When the motion was filed on July 21, 1941, it was asserted as a fact that "any past acts of force, threats or intimidation alleged to have been conducted or made by defendants-appellants in the course of the picketing of said Pearl E. Crosby's restaurant have, by the passage of time and circumstance, lost any coercive influence or effect which may be averred to have arisen therefrom, * * *".

The federal question was expressly raised before the Court of Appeals on the motion to modify. The motion set forth the rights of petitioners, "as citizens of the United States", to freedom of speech and press as granted by Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 30-31).

Similarly, the federal question was expressly raised, by assignment of error, in the Supreme Court of Ohio. The Supreme Court of Ohio ruled on the federal question, holding that "no debatable constitutional question was involved".

Thus the Ohio courts, by rendering their decisions herein in conflict with the decisions of this Honorable Court in the cases of *American Federation of Labor* v. *Swing,* 61 S. Ct. 568, and *Milk Wagon Drivers' Union, et al.* v. *Meadowmoor Dairies, Inc.,* 61 S. Ct. 552, have denied your petitioners rights and privileges guaranteed to them by the Constitution of the United States.

The following cases are believed to sustain jurisdiction: *Milk Wagon Drivers' Union, et al.* v. *Meadowmoor Dairies, Inc., supra; American Federation of Labor* v. *Swing, supra; Van Huffel* v. *Harkelrode,* 284 U. S. 225; *United States* v. *Swift & Co.,* 286 U. S. 106, 76 L. Ed. 999, 52 S. Ct. 460; *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736; *Carlson* v. *California,* 310 U. S. 106; *Journeyman Tailors Union, Local No. 195, Amalgamated Clothing Workers of America, et al.* v. *Miller's, Inc.,* 61 S. Ct. 732; *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296.

C

The Question Presented.

Does the decree of the Supreme Court of Ohio, sustaining the decree of the Court of Appeals of Cuyahoga County, Ohio, overruling your petitioners' motion to modify the

permanent injunction so as to permit peaceful picketing, abridge the right of freedom of speech and of the press guaranteed by the Fourteenth Amendment to the Constitution of the United States?

D

The Reasons Relied on for the Allowance of the Writ

The grounds relied on by the petitioners for the allowance of the writ are:

1. The decision of the Supreme Court of Ohio determined a federal question of substance in a manner directly at variance with the following decisions of this Honorable Court: *Milk Wagon Drivers Union, et al.* v. *Meadowmoor Dairies, Inc., supra; American Federation of Labor* v. *Swing, supra; Thornhill* v. *Alabama, supra; Carlson* v. *California, supra; Journeymen Tailors Union, Local No. 195, Amalgamated Clothing Workers of America, et al.,* v. *Miller's, Inc., supra; Senn* v. *Tile Layers' Protective Association,* 301 U. S. 468; *Bakery & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters, et al.,* v. *Hyman Wohl and Louis Platzman,* decided March 30, 1942; *Carpenters & Joiners Union of America, Local No. 213, et al.* v. *Ritter's Cafe, et al.,* decided March 30, 1942.

2. Despite the fact that the record in the original case, resulting in the permanent injunction, indicated acts of violence prior to the issuance of the permanent injunction, nevertheless, when the motion to modify was filed, there had been a lapse of approximately three and one-half years—with the exception of one day of peaceful picketing—since there had been any picketing whatever of respondent's restaurant. During the passage of time, the past violence "lost any coercive influence or effect" which

may have arisen therefrom. Thus, this case is clearly within the *Meadowmoor* case, wherein this Honorable Court stated as follows:

> "Inasmuch as the injunction was based on findings made in 1937, this decision is no bar to resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence."
>
> * * * * * * *
>
> "The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not the last say. They must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers* v. *Florida,* 309 U. S. 227. Since the union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here."

This is the first attempt of a labor union to seek protection by this Honorable Court of its constitutional right to communicate its grievances in accordance with the *Meadowmoor* decision. We respectfully urge that, unless certiorari be granted to review and set aside the judgment of the Supreme Court of Ohio, then the courts of that state and others may be encouraged to assign to the *Meadowmoor* decision a meaning and interpretation contrary to the express language of this Honorable Court, with the result that basic liberties of working people will be lost.

Prayer for Writ

Wherefore your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of Ohio, commanding that court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled No. 28861, Crosby, Plaintiff-Appellee, v. Rath et al., Defendants-Appellants, and that the decree of the Supreme Court of Ohio may be reviewed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

JOSEPH A. PADWAY,
HENRY KAISER,
JAMES A. GLENN,
MARTIN E. BLUM,
Counsel for Petitioners.

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No.

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Petitioners,

vs.

PEARL E. CROSBY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A

The Opinion of the Court Below

The decision of the Supreme Court of Ohio, sustaining the refusal of the lower court to modify its injunction, was rendered without opinion and is reported at 139 Ohio State 151.

B

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U. S. C. A., Section 344(b),

(Judicial Code, Section 237(b), as amended by the Act of February 13, 1925).

The Federal Question

Petitioners' motion to modify the injunction of the Court of Appeals of Cuyahoga County, Ohio, set forth clearly the claim of petitioners that the injunction, under the facts and circumstances then existing, abridged petitioners' right of free speech and free press in violation of the Fourteenth Amendment to the Constitution of the United States (R. 30). The respondent filed a motion to require petitioners to make their motion to modify definite and certain or to strike (R. 35). Respondent did not challenge the facts alleged in petitioners' motion to modify. The Court of Appeals, since no issue of fact was joined by the pleadings, did not see fit to call for proof in support of the allegations made in petitioners' motion. Accordingly, the facts alleged in petitioners' motion to modify must be accepted as true.

Petitioners asserted in their motion to modify the injunction that "any past acts of force, threats or intimidation" connected with the picketing of respondent's restaurant have, through the passage of time and change of facts, law and circumstances, "lost any coercive influence or effect" which may have arisen therefrom, and that a continuance of said injunction without modification to permit peaceful picketing in lawful manner and numbers would be a denial of petitioners' right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 31). This motion was overruled by the Court of Appeals of Cuyahoga County without opinion (R. 12).

Petitioners, by assignment of error in the Supreme Court of Ohio, attacked the decree of the Court of Appeals on the ground that it contravened their rights under the Consti-

tutions of the State of Ohio and the United States. It is there stated that error intervened as follows:

> "(2) In overruling appellants' motion to modify said decree of injunction, said Court of Appeals disregarded defendants-appellants' rights as guaranteed by the Constitutions of Ohio and of the United States" (R. 5-6).

The Supreme Court of Ohio overruled the motion of petitioners for an order directing the Court of Appeals to certify its record, and sustained a motion by appellee to dismiss the appeal filed as of right on the ground that no debatable constitutional question was involved in said case.

Thus, it is clearly shown by the record that the federal question was presented to and necessarily passed upon by all of the state courts to which petitioners could apply for the protection of their constitutional rights in this cause. Since petitioners' right freely to speak and to publicize has been denied by the state courts, it follows that this court has jurisdiction to entertain this petition for certiorari. The following cases sustain this court's jurisdiction: *American Federation of Labor* v. *Swing, supra; Milk Wagon Drivers' Union, et al.* v. *Meadowmoor Dairies, Inc., supra; Journeymen Tailors Union, Local No. 195, Amalgamated Clothing Workers of America, et al.* v. *Miller's, Inc., supra; Thornhill* v. *Alabama, supra; Carlson* v. *California, supra; United States* v. *Swift & Co., supra;* and *Van Huffel* v. *Harkelrode, supra.*

C

Statement of the Case

A summary statement of the case appears under the heading "A" in the Petition for Writ of Certiorari and, in the interest of brevity, is incorporated here by reference.

D

Specification of Errors

1. The decision of the Supreme Court of Ohio was erroneous in that it denied petitioners the right to freedom of speech and of the press in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Ohio erred in sustaining the decree of the Court of Appeals overruling the motion of petitioners to modify said injunction in such manner as to permit them to publicize the facts and circumstances of their labor dispute with the respondent by carrying banners and placards on the public highways; by oral and written statements; and otherwise by means of picketing peacefully in lawful manner and numbers.

3. The Supreme Court of Ohio erred in refusing to order said injunction modified by removing the restraints contained in the following paragraphs of said permanent injunction:

> "1. * * * from picketing, bannering or patrolling the streets or sidewalks adjacent to or in the vicinity of the plaintiff's place of business.
>
> "3. From inducing or attempting to induce any customer, prospective customer or any person, firm or corporation with whom plaintiff deals, not to deal with plaintiff; and from making, publishing, distributing, or displaying any statement, oral, written, printed, painted or otherwise, or from any other act or thing with the intent, purpose or effect of injuring the plaintiff's business and from threatening to do so."

4. The Supreme Court of Ohio erred in failing to hold that the permanent injunction abridged petitioners' right of free speech and free press guaranteed by the Fourteenth

Amendment to the Constitution of the United States, and in failing to modify said injunction.

E.

ARGUMENT

This Honorable Court has held that dissemination of information concerning the facts and circumstances of a labor dispute *must* be regarded as within the scope of that freedom to speak and to publicize which is protected by the Fourteenth Amendment from abridgment by the states. *American Federation of Labor* v. *Swing, supra; Milk Wagon Drivers' Union, et al.* v. *Meadowmoor Dairies, Inc., supra; Thornhill* v. *Alabama, supra; Carlson* v. *California, supra; Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State, supra; Senn* v. *Tile Layers' Protective Association, supra.*

The holding of this Honorable Court in the *Meadowmoor* case is based upon the theory that the coercive effect of past violence may be projected into the future—notwithstanding a decree has been rendered enjoining any threats, acts of violence or other unlawful conduct—and that, accordingly, future peaceful picketing may be enjoined.

In so holding, however, this Honorable Court made it abundantly clear that such coercive effect may expire and be lost through the lapse of time without recurrence of violence and by change of circumstances; that when such coercive effect is dissipated, the right of free speech and free press cannot be longer proscribed; and that upon application, in a proper case, the prohibitions of an injunction will be relaxed to permit the exercise of these rights as guaranteed by the Constitution of the United States.

Since it is undisputed that such coercive effect has been lost, the courts of Ohio erred in refusing to modify the injunction as requested. It should be noted that more than three and one-half years had elapsed, during which

time there had been no recurrence of any unlawful conduct, and during all of this time the petitioners have obeyed strictly the decree of the court prohibiting not only conduct ordinarily regarded as unlawful, but peaceful picketing as well.

Of the grounds for modification of such an injunction this Court said in the *Meadowmoor* case:

> "Inasmuch as the injunction was based on findings made in 1937, this decision is no bar to resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence."
>
> * * * * * * *
>
> "(3) The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not the last say. They must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers* v. *Florida*, 309 U. S. 227. Since the union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here."

The injunction in this case was originally affirmed by the Supreme Court of Ohio in accordance with its opinion (136 O. S. 352), printed herein as an appendix to this brief. Certiorari was denied by this Honorable Court on the same day that the decisions were rendered in the *Swing* and *Meadowmoor* cases. Whether or not certiorari was denied because of some procedural defect, it remains clear that

the same principles announced in these cases are applicable to the present case. Nevertheless, the Supreme Court of Ohio has not recognized the principles declared by this Court either in this case or in the case of *Springfield, Ohio, Local No. 352, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, et al.*, v. *William Settos*, certiorari denied by the Supreme Court of the United States, October 20, 1941, 86 L. Ed. 89, 62 S. Ct. 123.

The parties to the labor dispute in the instant case, their mutual relationship to each other and to the industry involved, and the controversy itself, are all indistinguishable from those in the *Swing* case. Whatever the precise test applied in the *Ritter* case (*Carpenters & Joiners Union of America, Local No. 213, et al.* v. *Ritter's Cafe, et al.*, decided March 30, 1942), this case is clearly distinguishable and is clearly within the doctrine and holding of the *Swing* case.

Petitioners, therefore, appeal to this Honorable Court to prevent abridgment of their constitutional rights by the State of Ohio.

Respectfully submitted,

JOSEPH A. PADWAY,
HENRY KAISER,
JAMES A. GLENN,
MARTIN E. BLUM,
Counsel for Petitioners.

APPENDIX.

Statement of the Case.

CROSBY, APPELLANT, *v.* RATH ET AL., APPELLEES.

Injunction—Labor unions—Picketing and boycotting enjoined—No legitimate trade dispute existed.

(No. 27639—Decided March 6, 1940.)

APPEAL from the Court of Appeals of Cuyahoga county.

The plaintiff is the operator of a restaurant in the city of Cleveland.

The defendants are officers and members of three voluntary, unincorporated associations known as labor unions.

In her second amended and supplemental petition the plaintiff asks an injunction to restrain the defendants from continuing certain acts of violence in furtherance of a conspiracy to injure her restaurant business and thereby compel her to discharge her employees unless they become members of one of the defendant unions.

With few exceptions the controlling facts in the case are not in serious dispute. The evidence in the record discloses that the plaintiff's present employees are not members of a union or represented thereby; that they do not desire such membership; that each employee is serving under a renewable, written, three-month contract; that in selecting her employees the plaintiff makes no inquiry as to such membership; that in a number of instances she has employed union members; that when asked by her employees for advice on this subject she tells them to follow their own preference; that she never has discharged an employee because of membership in a union; that there is no dispute between the plaintiff and her employees; that she has permitted a representative of the defendant unions to solicit her employees; that the defendants do not complain about the wages paid by the plaintiff to her employees; that the defendants do not accuse the plaintiff of underselling restaurants employing union members exclusively; that on October 4, 1937, the defendants began to

picket plaintiff's restaurant; that the number of persons engaged in picketing varied from 40 to 100; that these persons wore union badges and obstructed the entrance to the plaintiff's restaurant; that they called the plaintiff's employees vile and obscene names; that they threatened, assaulted, struck and injured some of the plaintiff's employees, one of whom suffered a fractured jaw; that plaintiff's restaurant was stenchbombed on two occasions; that a dynamite bomb was exploded at the place of the plaintiff's former residence; that an attempt was made to bomb the plaintiff's present residence; that the home of one of the plaintiff's employees was stenchbombed; that the homes of some of the plaintiff's customers were stenchbombed; that some of the plaintiff's customers who drove to her restaurant found the tires of their automobiles cut and punctured while there; that anyone attempting to deliver supplies to plaintiff's restaurant was insulted and threatened; that one delivery truck driven by a union driver was seized and partially burned; and that during the period of picketing the plaintiff's business was reduced to approximately one-third of its former volume. The defendants disclaim responsibility for the above-enumerated acts of violence and insist that the contracts existing between the plaintiff and her employees are invalid.

The Court of Common Pleas rendered a decree in favor of the plaintiff. The employment contracts were held valid, and the court found that no legitimate trade dispute was involved. The defendants were enjoined from picketing or boycotting the plaintiff's restaurant and from interfering with the operation of the plaintiff's business.

Upon appeal to the Court of Appeals on questions of law and fact the decree of the court was the same as that of the Court of Common Pleas except that picketing and boycotting were permitted.

The case is in this court for review upon the allowance of a motion to certify the record.

Messrs. Galvin & Babin and *Messrs. Stanley & Smoyer*, for appellant.

Mr. Martin E. Blum and *Mr. Leonard J. Stern*, for appellees.

BY THE COURT. The question as to the validity of the three-month, written, renewable employment contracts here involved requires no discussion. Both the Court of Common Pleas and the Court of Appeals held them valid, and a study of the record discloses nothing tending to support the contention of the defendants to the contrary.

The controlling question in the case is whether the evidence discloses the existence of a legitimate trade dispute. However, this difficulty is simplified by the fact that both the plaintiff and the defendants rely upon the decision of this court in the case of *La France Electrical Const. & Supply Co.* v. *International Brotherhood of Electrical Workers*, 108 Ohio St., 61, 140 N. E., 899, subsequently cited with approval in the case of *State, ex rel. United District Heating, Inc.*, v. *State Office Building Commission*, 125 Ohio St., 301, 181 N. E., 129. In the *La France case* this court gave careful consideration to the principles of law relating to the subject of trade disputes, and affirmed the decision of the lower courts permitting the picketing of the employer's plant. But in the opinion it is clearly pointed out that "Upon the record with regard to this point there can be little doubt that a legitimate trade dispute existed in this case, in which former employees of the plaintiff company were seeking to secure the right to work with the company under terms of employment different from those which their employer was at the time requiring. That being the case, the methods open to use in a legitimate trade dispute were open to strikers here." Of course, as already indicated in the factual statement, it is not even contended that in the instant case there is any dispute whatsoever between the plaintiff and her employees, as in the *La France case, supra*. On the contrary, the only dispute in the instant case is between the plaintiff and the defendants with whom the plaintiff's employees have no connection. The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. That this must be the law is clearly indicated by the intolerable and unexplain-

able predicament in which an employer might well find himself if picketed by two or more hostile unions with each one insisting that the employer discharge his employees unless they become members of that particular union alone.

Finally it should be noted that the instant situation is concededly unaffected by statute. This clearly distinguishes the case from most of the authorities relied upon by the defendants.

Two recent decisions restating the generally accepted rule are to be found in the cases of *Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers' Union*, 371 Ill., 377, 21 N. E. (2d), 308, and *Roth* v. *Local Union*, — Ind., —, 24 N. E. (2d), 280. In the former case one paragraph of the syllabus reads in part as follows:

"The right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities in interference with another's business * * *."

The decree of the Court of Appeals must be reversed to the extent that it permits picketing and boycotting. Final judgment is hereby rendered in conformity with the decree of the Court of Common Pleas.

Judgment reversed in part.

Weygandt, C. J., Williams, Matthias and Hart, JJ., concur.

Myers, J., concurs in the judgment only.

Day and Zimmerman, JJ., dissent.

Myers, J., concurring. Since the case is in equity, the pleas of both plaintiff and defendants are addressed to the trial court as a chancellor. All elements of the case are to be considered. The conduct of the parties will be carefully scrutinized to determine whether they are entitled to relief or protection of the court. From a consideration of the entire record, the trial court was justified in its finding that there was a proximate connection between the acts of de-

fendants and the violence charged. In respect to the plaintiff's place of business, the defendants have therefore forfeited whatever rights they might otherwise have had peaceably to picket under the law. Rights peaceably exercised will be protected by the courts but such protection is forfeited when the attempted exercise thereof is accompanied by acts of violence as in the instant case.

For the reasons stated I concur in the judgment only.

DAY, J., dissenting. I dissent from the view of the majority of this court.

The Court of Common Pleas granted an injunction, restraining all picketing, bannering and boycotting of plaintiff's restaurant. On hearing *de novo*, the Court of Appeals permitted picketing and bannering, which judgment is here for review. The record discloses that picketing was not accompanied by violence following the judgment of that court. It is the judgment of the Court of Appeals which is here for review, and that judgment did not permit picketing accompanied by violence.

Peaceful picketing, by carrying placards, signs, distribution of literature, or by oral speech, is not, in and of itself, unlawful. It is a lawful right emanating from and protected by the constitutional provision governing the exercise of free speech.

The judgment of the Court of Appeals should be affirmed.

ZIMMERMAN, J., dissenting. From a reading of the majority opinion, this case would appear to be wholly one-sided. However, such is not the fact and the writer believes the position of the defendants, supported by ample and respectable authority, is entitled to expression.

Having had a strict injunction issued against them in the Court of Common Pleas forbidding any "picketing," the defendants appealed the cause on questions of law and fact to the Court of Appeals.

The higher court heard the controversy *de novo*, but substantially on the record as made in the court of first instance. The matter was presented to Judges Hamilton, Ross and Matthews of the First Appellate District, sitting by designation in the Eighth Appellate District.

By unanimous action the court found that Mrs. Pearl E. Crosby operates a restaurant in the city of Cleveland, and does not employ union labor; that her employees are under contract for specified terms of employment and do not desire to become unionized, and that the defendant unions have the right to notify the public that Mrs. Crosby does not employ union labor.

Apparently following the principles enunciated in the case of *S. A. Clark Lunch Co.* v. *Cleveland Waiters & Beverage Dispensers Local*, 22 Ohio App., 265, 154 N. E., 362, it was "ordered, decreed and adjudged," subject to the limitations of laws or ordinances as to the use of streets and sidewalks, that the defendant unions might maintain two moving representatives near the front of the restaurant and one at the rear entrance for the sole purpose of informing the public orally, or by handbills and signs, that Mrs. Crosby does not employ union help, and to request that the restaurant be not patronized for that reason; such activities to be conducted in a quiet, orderly fashion, and so as not to interfere with any person desiring to enter or leave the restaurant for any purpose.

The defendants, and those having notice of the order, were enjoined from molesting, interfering with, or annoying Mrs. Crosby and her employees in any manner.

Was such decree reasonable, proper and lawful? A majority of this court holds in effect it was not, adopting the attitude that "peaceful picketing" is only authorized when a *bona fide* trade or labor dispute exists directly between an employer and his employees, as concerns wages, hours, working conditions, etc. Supporting this conclusion, reliance is placed on the case of *La France Electrical Construction & Supply Co.* v. *International Brotherhood of Electrical Workers*, 108 Ohio St., 61, 140 N. E., 899.

With due deference for the opinion of his associates, the writer of this dissent submits that the general view taken by the majority is too narrow, and that the *La France case*, upon its facts, is not authority for the proposition that "peaceful picketing" may be resorted to only in the event of a strike.

Acts of violence perpetrated against Mrs. Crosby, her employees and customers are mentioned in the majority

opinion. It is to be borne in mind that these occurred prior to the issuance of the injunction by the Court of Common Pleas, that the defendants disclaim responsibility therefor, and that there is a lack of evidence implicating them.

Be that as it may, such conduct, by whomsoever carried on, cannot be defended, condoned or sanctioned.

Responsible labor leaders realize that the pursuit of illegal methods to bring about what may be a desirable result is harmful to the labor movement as a whole, and arouses public opinion against the cause of organized labor.

However, we are not here concerned with the past. Our primary function is to determine whether the order of the Court of Appeals for the future should remain undisturbed. *J. H. & S. Theatres, Inc.*, v. *Fay*, 260 N. Y., 315, 320, 183 N. E., 509, 511. Or, as it was put in *Fenske Bros., Inc.*, v. *Upholsterers International Union*, 358 Ill., 239, 260, 193 N. E., 112, 121, 97 A. L. R., 1318, 1333: "The mere fact that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceable persuasion."

No one will seriously deny that organized labor has done as much if not more than any other single agency to improve the lot of working people as a class. Increased wages, shorter hours, better working conditions and a higher standard of living can be ascribed in an important degree to its activities and influence. The struggle has been long and arduous, and the continued existence of labor organizations as effective bodies is dependent upon progress.

While, of course, no employer can be compelled to hire union workmen, and no workman can be forced to join a labor union, organized labor should have the privilege, in a reasonable, peaceable and orderly way, of advising the public, if it so desires and for what it may be worth, of the truth concerning an employer of labor, especially where the practices followed and the policies pursued by such employer are opposed to the interests of union labor, and are considered deleterious to employees generally, or to employees engaged in a particular kind of work. The defendants strongly urge that such is the situation as con-

cerns the Crosby restaurant, and testimony in the record is pointed out as supporting the contention.

Irrespective of special legislation on the subject of which there is none in Ohio, the term "trade dispute," or "labor dispute," according to the liberal judicial concept, has a broader and more comprehensive meaning than the one given it by the majority of this court.

Such concept is exemplified in the leading case of *Exchange Bakery & Restaurant, Inc.*, v. *Rifkin*, 245 N. Y., 260, 263, 157 N. E., 130, 132, where the court said:

"The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

Again, in *Blumauer* v. *Portland Moving Picture Machine Operators' Protective Union*, 141 Ore., 399, 403, 17 P. (2d), 1115, 1116, it was remarked:

"Organized labor has the right to present its side of a controversy to the public by all lawful means if such means may be, and are, used in a lawful manner without violence, or threats, or intimidation of the employer, his employees, or the patrons of the employer's business. * * *

"This right of presenting its side of a controversy, organized labor may exercise by lawful means, in a lawful manner when its members have reasonable grounds to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees generally, or of those in a particular trade or calling, even though there may be no direct controversy between the employer and his immediate employees."

In the later case of *Geo. B. Wallace Co.* v. *International Association of Mechanics*, 155 Ore., 652, 664, 63 P. (2d), 1090, 1095, the same court observed:

"Without any attempt to reconcile all that has been said on the subject, we think the better reasoned cases are to the effect that a strike and picketing are not necessarily concomitant. There may be a strike without picketing and picketing without a strike. Each is a combative weapon which labor may use to accomplish its objectives if the same be lawful."

And in *Music Hall Theatre* v. *Moving Picture Machine Operators*, 249 Ky., 639, 642, 61 S. W. (2d), 283, 285, this language appears:

"The law recognizes the right of peaceful picketing. Although that term is sometimes criticised as a contradictory one, since the word 'picketing' is taken from the nomenclature of warfare and is strongly suggestive of a hostile attitude, it has acquired a significance and meaning commonly understood. It connotes peaceable methods of presenting a cause to the public in the vicinity of the employer's premises. Labor has the recognized legal right to acquaint the public with the facts which it regards as unfair, to give notoriety to its cause, and to use persuasive inducements to bring its own policies to triumph."

A number of courts, in the absence of enactments like the Norris-LaGuardia Act (29 U. S. Code, Section 101 *et seq.*), and where no controversy has existed between an employer and his immediate employees, have held "peaceful picketing" lawful, when its avowed design and purpose

is to benefit organized labor directly or indirectly. Some of the representative cases are: *United Chain Theatres, Inc.,* v. *Phila. Moving Picture Machine Operators Union* (D. C., Pa.), 50 F. (2d), 189; *Steffes* v. *Motion Picture Machine Operators Union,* 136 Minn., 200, 161 N. W., 524; *Empire Theater Co.* v. *Cloke,* 53 Mont., 183, 163 P., 107, L. R. A. 1917E, 383; *Bomes* v. *Providence Local No. 223 of Motion Picture Operators,* 51 R. I., 499, 155 A., 581; *Nann* v. *Raimist,* 255 N. Y., 307, 314, 174 N. E., 690, 73 A. L. R., 669, 674. Compare *People* v. *Harris,* 104 Colo., 386, 91 P. (2d), 989, 122 A. L. R., 1034; *Scofes* v. *Helmar,* 205 Ind., 596, 187 N. E., 662; *Kirmse* v. *Adler,* 311 Pa., 78, 166 A., 566.

In *American Furniture Co.* v. *I. B. of T. C. & H. of A. Chauffeurs, etc., Local, Teamsters & Helpers General Local,* 222 Wis., 338, 359, 268 N. W., 250, 260, 106 A. L. R., 335, 348, the court confidently stated that the proponents of the *Norris-LaGuardia Act* intended to enact into law the views expressed in *Exchange Bakery & Restaurant* v. *Rifkin, supra* (245 N. Y., 260, 263, 157 N. E., 130, 132).

Under language as used in such act (29 U. S. Code, Section 113 [a] and [c]), it has been expressly held that a "labor dispute," permitting "peaceful picketing" adjacent to an employer's establishment, may exist, even though none of the employees are union members, and there is no altercation between the employer and his employees. *Senn* v. *Tile Layers Protective Union,* 222 Wis., 383, 268 N. W., 270, affirmed 301 U. S., 468, 81 L. Ed., 1229, 57 S. Ct., 857; *Lauf* v. *E. G. Skinner & Co.,* 303 U. S., 323, 82 L. Ed., 872, 58 S. Ct., 578; *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S., 552, 82 L. Ed., 1012, 58 S. Ct., 703; *L. L. Coryell & Son* v. *Petroleum Workers Union* (D. C., Minn.), 19 F. Supp., 749.

The opinion has also been advanced that an injunction denying the members of a labor union the right to apprise the public of the true facts in relation to an employer of labor by means of "peaceful picketing," reasonably exercised on a defensible basis, would constitute an infringement of the constitutional guaranty of free speech. *Senn* v. *Tile Layers Protective Union, supra* (301 U. S., 468, 478, 81 L. Ed. 1229, 1236, 57 S. Ct., 857); *People* v. *Harris, supra* (104

Colo., 386, 394, 91 P. [2d], 989, 993). Compare, *Schneider* v. *State of New Jersey* (*Town of Irvington*), *etc.*, 307 U. S., . . . , 84 L. Ed., . . . , 60 S. Ct., 146.

While Mrs. Crosby declares she is not antagonistic toward union labor and has no objection to her employees becoming union members, the record contains instances tending to belie such statements. Particular reference is made to the reaction initially displayed to the suggestion of unionization and the tactics subsequently adopted; to the treatment of a union waitress working for a time at the Crosby restaurant, and to the development when a union organizer attempted to approach the restaurant cooks, who had evinced a friendliness to his overtures.

Furthermore, the representations of the defendants and the conclusion of the Court of Appeals as to the object of the "peaceful picketing" cannot be ignored. If it were clear that the dominant motive was to ruin Mrs. Crosby's business from a purely evil incentive rather than to promote the interests of union labor, a different attitude would be in order, for "when the purpose of picketing is to injure or destroy a business rather than to further the common interests of the worker, it is an unlawful interference with the property rights of the employer and should be enjoined." *Geo. B. Wallace & Co.* v. *International Association of Mechanics, supra* (155 Ore., 652, 664, 63 P. [2d], 1090, 1095).

Therefore it is finally submitted that the judgment of the Court of Appeals is justifiable and should be affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1147.

FRANK G. RATH,
Individually and as President of Hotel and Restaurant Employees' International Alliance, Cooks' Local Union No. 167, *et al.*,
Petitioners,

vs.

PEARL E. CROSBY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

I.

STATEMENT OF THE CASE.

This is approximately the fifteenth stage of protracted litigation over the identical issue and the second time that this case has reached this Court.

Petitioner's "Summary Statement" fails to mention two important facts which we now supply, namely, that in granting the permanent injunction the Supreme Court of Ohio found that the following facts were "not in serious dispute":

> "* * * that on October 4, 1937, the defendants began to picket plaintiff's restaurant; that the number of persons engaged in picketing varied from 40 to 100; that these persons wore union badges and obstructed the entrance to the plaintiff's restaurant; that they called the plaintiff's employees vile and obscene

names; that they threatened, assaulted, struck and injured some of the plaintiff's employees, one of whom suffered a fractured jaw; that plaintiff's restaurant was stenchbombed on two occasions; that a dynamite bomb was exploded at the place of the plaintiff's former residence; that an attempt was made to bomb the plaintiff's present residence; that the home of one of the plaintiff's employees was stenchbombed; that the homes of some of plaintiff's customers were stenchbombed; that some of the plaintiff's customers who drove to her restaurant found the tires of their automobiles cut and punctured while there; that anyone attempting to deliver supplies to plaintiff's restaurant was insulted and threatened; that one delivery truck driven by a union driver was seized and partially burned; and that during the period of picketing the plaintiff's business was reduced to approximately one-third of its former volume."

And, as to each of plaintiff's present employees,

"That each employee is serving under a renewable, written, three-month contract."

Appendix to Petition for Writ of Certiorari, pages 16 and 17.

II.

SUMMARY OF ARGUMENT.

We respectfully submit that certiorari should be denied in this case for the following reasons:

A. The Federal question stated was not seasonably raised nor decided.

B. The judgment of the State Court is based on non-Federal grounds adequate to support it.

C. The Federal question raised is not substantial because:

(1) It involves merely the sufficiency of the evidence to support the finding;

(2) The decision of the State court was clearly justified.

III.

ARGUMENT.

A. THE FEDERAL QUESTION STATED WAS NOT SEASONABLY RAISED NOR DECIDED.

When this case was before this Court at the *October Term, 1940, No. 187* (312 U. S. 690), respondent advanced four principal reasons why certiorari should be denied:

1. That no federal question was either presented to or decided by the State Court.
2. That according to local law no legitimate trade dispute existed.
3. That the picketing was accompanied by excessive violence.
4. That respondent's employees were bound by valid employment contracts.

This Court did not state the reasons for denying certiorari but because the decision was rendered on the same day as *American Federation of Labor vs. Swing*, 312 U. S. 321, and *Milk Wagon Drivers' Union et al. vs. Meadowmoor Dairies, Inc.*, 312 U. S. 287, ground (2) above may be disregarded. Had this Court found that the factual situation in our case was similar to that in the *Swing* case, it would have reversed the decision of the Ohio court as it did the decision of the New Jersey court in *Journeyman Tailors' Union vs. Miller's, Inc.*, 312 U. S. 658. Respondent may therefore reasonably surmise that this Court found merit in one or more of the other three points.

Assuming that the first point was decisive, namely, that the federal question was neither presented nor decided in the State court, petitioners believe they have invented a formula for circumventing this jurisdictional requirement in equity cases. This formula assumes that if a petitoner is denied admittance to this Court because he has failed to save the federal question (as occurred not only in the *Crosby* case but in the more recent cases of *Springfield,*

Ohio, Local No. 352, et al., vs. Settos, 314 U. S. ...., 62 S. Ct. 123, 86 L. Ed. 89, and *Opera on Tour, Inc., vs. Weber,* 314 U. S. ...., 62 S. Ct. 96) he has another method of entry immediately available, namely, he need only attack the decree by filing a motion to modify the order, requesting therein that there be stricken from the order the only portion in controversy and therein for the first time to assert the federal question.

Manifestly this is the equivalent of an application for a rehearing of the former petition for certiorari. It is analogous to the situation where an appellant, who has failed to take a timely appeal, applies for or obtains a rehearing for the sole purpose of extending his time for appeal. Cf. *Wayne United Gas Co. vs. Owens-Illinois Glass Co.,* 300 U. S. 131. It would seem that this Court should not permit petitioners to employ this subterfuge to cure their original non-compliance with jurisdictional requirements for review. If the federal question is not raised at any stage in the State Court, and this Court declined jurisdiction for that reason, the omission ought not to be curable by the device of a motion to modify the original decree.

B. THE JUDGMENT OF THE STATE COURT IS BASED ON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT.

The Ohio Supreme Court said:

> "The question as to the validity of the three-month, written, renewable employment contracts here involved requires no discussion. Obviously the Court of Common Pleas and the Court of Appeals held them valid, and a study of the record disclosed nothing tending to support the contention of the defendants to the contrary."
>
> *Appendix to Petition for Certiorari,* page 18.

Petitioners had notice of the existence of the contracts and their acts were not only calculated to induce, but were for the express purpose of inducing, the breach thereof by

the employees or by the respondent. Petitioners admitted that it was their purpose to compel respondent to discharge her employees in breach of the contracts and to replace them with members of petitioners' organizations. *Appendix to Petition for Writ of Certiorari,* p. 18.

There were no contracts in the facts of either the *Meadowmoor* or *Swing* cases.

Petitioners' motion to modify alleged no change in petitioners' purpose, nor in the existence or effect of the employment contracts.

It is good common law in Ohio, as elsewhere, that it is illegal to persuade another to break a valid employment contract for a definite period of time.

> *LaFrance v. Electrical Workers,* 108 O. S. 61, 94;
> *Hamilton Tailoring Co. v. Joint Board,* 132 O. S. 259.

The Ohio Supreme Court having found these contracts valid, picketing for the express purpose of attempting to compel the breach of these contracts was clearly directed to an unlawful objective and was therefore illegal under Ohio law. If a State court reasonably concludes that the labor objective sought is illegal, it can deny immunity to a labor union for injuries inflicted by activities designed to achieve that purpose. A decree restraining such activities does not infringe constitutional rights and does not present any federal question. See *Opera on Tour, Inc. vs. Weber, Inc.,* 285 N. Y. 348, 34 N. E. (2d) 349, certiorari denied, 86 L. ed. (Adv.) 66.

C. THE FEDERAL QUESTION RAISED IS NOT SUBSTANTIAL BECAUSE

(1) It involves merely the sufficiency of the evidence to support the finding.

Assume that the third point was decisive, namely, that the picketing was accompanied by excessive violence, petitioners have seized upon one paragraph in the *Meadowmoor* case as support for their attempt to re-litigate the issues. Again they believe that they have found an easy expedient to obtain multiple trials and multiple reviews of the same issues. If their contrivance is successful, then every prior injunction, whenever entered, whether erroneously decided contrary to the doctrine of the *Swing* case or correctly decided in accordance with the doctrine of the *Meadowmoor* case, may now be re-litigated in this Court for asserted violations of the due process clause. Moreover, the losing party can make successive applications for modification and urge each denial as an impairment of his constitutional rights.

The net result of such procedure would make this Court an arbiter of factual questions, and would narrow the scope of the powers of State courts to determine finally the controlling facts of particular controversies.

There is nothing in the opinion of the *Meadowmoor* case that requires such result. The paragraph quoted in petitioners' brief (pages 7 and 14) repeats a rule of "familiar equity procedure" that a court which grants an injunction has the power to modify it at a later date when it is convinced that a change in circumstances renders it of no further benefit to the plaintiff and makes it unjust to the defendant.

In passing upon such an application the chancellor is called upon to exercise a sound discretion. He must determine whether the facts which existed at the time of the decree have so materially changed that there is no longer

any reasonable apprehension of injury. In the words of Mr. Justice Cardozo:

> "The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. * * * Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."
>
> *United States vs. Swift & Co.,* 286 U. S. 105, 119.

The State Court is clearly an appropriate forum for the determination of this issue of fact. Having observed the original tendencies to and responsibility for disturbance and violence, the State Court is in the better position to weigh the evidence, draw inferences from the conceded facts, and to choose between conflicting inferences.

The fact that injunction is essentially a preventive remedy, designed to guard against future injury, does not mean that the mere discontinuance by the petitioners of their wrongful and illegal acts under the compulsion of a court order, or their mere statement that they have abandoned the intent to commit the wrongful acts, compels a court of equity to modify the injunction. This was explicitly recognized in the *Meadowmoor* case. The question always remains whether the temptation to resume still exists, whether the opportunity for abuse has been removed, and whether the momentum of fear has been spent. Nothing in the Fourteenth Amendment prohibits a state from basing "protection against future coercion on an inference of the continuing threat of past misconduct."

The State Court in the instant case found that the picketing was "so enmeshed with contemporaneously violent conduct" that petitioners' action was intended to coerce rather than to persuade.

> "In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though further picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection."
>
> *Meadowmoor* case, 312 U. S. 287, 294.

This Court recognizes constantly the importance of maintaining the balance of our federal system and though it has "zealous regard for the guaranties of the Bill of Rights," it also gives "due recognition to the powers belonging to the state." The State Court is an appropriate forum to settle the issues of fact and to draw inferences from established facts. This Court gives deference to State Court determinations of factual questions unless it clearly appears that the State Court's findings are spurious and are a palpable evasion of constitutional guaranties. This Court has therefore ruled that if the question presented is the sufficiency of evidence to support a finding, it does not raise a substantial federal question.

> *New York, ex rel., Consolidated Water Co. vs. Maltbie,* 303 U. S. 158.

(2) The decision of the State Court was clearly justified.

Besides the recital of the history of this litigation, the motion for modification contained nothing except a general statement that the passage of time, plus a change of law, presently entitles petitioners to picket Mrs. Crosby's restaurant. They allege that by the passage of time the "past acts of force, threats, or intimidation" have "lost any coercive influence or effect * * *." These are merely the conclusions of the pleaders. They are nothing more than their protestations of reform, their naked assertions that their previous victims have forgotten the petitioners' acts of violence, and their promise to be good.

The chancellor was not bound to accept these promises of repentance in the light of the record before him. Throughout this litigation petitioners have denied responsibility for the acts of violence. No court has believed petitioners' prior assertions that they were not responsible for the acts of violence in the face of the overwhelming evidence against them. The protestations by aggressors of their peaceful intentions are accepted only by the credulous. Reasonable people, familiar with the history of their past activities and promises, are dubious of appeasement.

The exact form of order which petitioners have sought by their motion to modify had been tried by the Ohio Court in this case and while that order was in effect a major portion of the violence in this case was committed.

The record of this case shows that at the inception of this litigation the respondent consented to an order permitting limited picketing and restraining violence only. (*Petition for Writ of Certiorari,* page 2.) The Ohio Court gave this order a fair trial for three months and while such an order was in effect the reign of terror described in our statement of the case occurred. (*Petition for Certiorari,* pages 21 and 22.)

Moreover, there has been no change whatsoever either in the circumstances or the law between the time of the final decree and the filing of the instant motion to modify. Every fact, claim and rule of law now relied on was available when the challenged decree was entered. The controversy which evoked the decree remained unsettled and the reasons for the decree still existed. Certainly mere compliance with the injunction did not constitute ground for its vacation.

Petitioners' reference to a lapse of three and a half years is misleading. The Ohio courts follow the general equity rule that the extent of relief granted is determined

by the facts as they existed at the time of the decree and not as they were at the inception of the litigation. This rule has been applied to deny an injunction in a labor case where the facts materially changed by the time of the hearing in the Court of Appeals.

> *Schur-Hirst Co. vs. Amalgamated Clothing Workers,* 5 Ohio Law Abstract 551 (Court of Appeals, Eighth Judicial District).

After the Common Pleas Court had granted the permanent injunction in Mrs. Crosby's case, the petitioners had ample opportunity to prove to the Court of Appeals that the force of the violence had been dissipated. Under Ohio practice petitioners were entitled to and had as of right, a trial *de novo* in the Court of Appeals.

> *Dehmer vs. Campbell,* 124 O. S. 634.

However, petitioners offered no additional evidence. They elected to proceed on the record made in the Court of Common Pleas, supplemented by two stipulations not material here. No proof was offered then, almost two years later, that the taint of force had been removed.

The final decree in the *Crosby* case was actually entered on June 30, 1941 after this Court had decided both the *Swing* and *Meadowmoor* cases (R. 32). Undoubtedly the Ohio court then felt that upon all the evidence Mrs. Crosby was then entitled to the decree that is now in effect. Had it then concluded differently, it then had the power to adjust its decree. It did not do so.

Unless abuse is glaringly apparent, this Court must assume that in the consideration of petitioners' motion to modify the State Court re-examined the record and the decree in the light of the recent decisions of this Court and denied the motion, in the exercise of a sound discretion.

The Ohio courts have shown no tendency to defy the decisions of this Court in apposite cases but have, on the contrary, followed them respectfully.

Evans v. Retail Clerks, 66 O. App. 158, 32 N. E. (2d) 51;

Friedman v. Cincinnati Local Joint Board, case No. 6032, Court of Appeals, First Appellate District of Ohio, reversing *Friedman vs. Cincinnati Joint Board*, 20 Oh. Op. 473.

The record shows that less than two months elapsed between the actual entry of the final decree in this case and the motion to modify it (R. 32, 28). Nothing had changed in that interval. Everything urged in support of the motion could have been urged with equal force against the entry of the decree. All past violence had ceased under the command of an injunction, but the fear of its continuance and the belief in its coercive effects were as rational on July 21, 1941 as they were on June 30, 1941. The extensiveness of the past violence was adequate reason for entering the injunction on June 30, 1941 and was equally adequate for refusing to modify it less than two months later. Again quoting Mr. Justice Cardozo:

> "Whatever persuasiveness the reasons then had, is theirs with undiminished force today."
>
> *United States v. Swift & Co.*, 286 U. S. 105, 115.

In sum, all of the claims made in the motion to modify are really addressed to the merits of the question whether the decree should have been granted in the first place. Petitioners' motion is a mere device to re-litigate the original issue which was "solemnly adjudged" after a protracted contest all the way through this Court, namely, whether under the facts in this case the petitioners should be permitted to picket Mrs. Crosby's restaurant. That determination will not be lightly undone by the mere dis-

claimer by petitioners of an intention to resume their unlawful conduct. It is high time this controversy is put to rest.

"One trial of an issue is enough."

Treinies v. Sunshine Mining Co., 308 U. S. 66.

Respectfully submitted,

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